

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-221333

DATE:

April 14, 1986

MATTER OF: Tandem Computers, Inc.

## DIGEST:

1. Protester may delay filing protest until after debriefing is held where protest is based on information regarding the awardee's proposal and that information was first revealed at the debriefing.
2. Awardee's noncompliance with salient characteristics set out in a request for proposals may not be waived notwithstanding that awardee's product meets the government's needs, since the characteristics were material to protester's and other potential offerors' decision to compete.
3. Offerors may reasonably rely on request for proposals as indicating the government's needs. Where, based on such reliance, a protester submits a proposal that is in line for award but is not accepted because the government determines that its needs can be met by significantly less expensive equipment of different type, the protester may recover its proposal preparation costs unless it chooses to compete under the revised RFP.

Tandem Computers, Inc. protests the award of a contract to Federal Computer Corporation under request for proposals (RFP) No. N00185-85-R-0379, issued by the Navy on a brand name or equal basis for computer hardware, software, training and maintenance for the Navy's Automated Procurement and Accounting Data Entry System. The protester contends that the hardware offered by Federal Computer failed to meet several salient characteristics in the RFP. We sustain the protest.

The RFP called for an indefinite quantity of hardware, software and related services to be provided over a 3-year period from the date of award. The principal hardware items to be furnished were display terminals, identified as Tandem Model 6530, or equal; workstations, identified as Tandem Model 6546, or equal; and cluster concentrators, identified as Tandem Model 6820, or equal.

Proposals were received from three offerors: the protester, Federal Computer, and Federal Data Corporation. The protester and Federal Data offered the brand name terminals, workstations, and concentrators; Federal Computer offered IBM Personal Computers (PCs and PC/XTs (PCs)), and Tandem 6600 cluster controllers. The Navy found all three offerors' initial proposals to be technically acceptable but subject to clarification. Following clarification, all three offerors submitted best and final offers, which were found to be acceptable. Award then was made on November 15, 1985 to Federal Computer as the lowest-priced, technically acceptable offeror.

According to Tandem, the PCs and controllers offered by Federal Computer are not equivalent to the brand name products and were not acceptable.

#### Timeliness

At the outset, we consider the Navy's contention that Tandem was on notice by November 19 of the facts on which its protest is based. The Navy argues that the protest is untimely and should be dismissed because it was not filed until December 9, more than 10 working days after the basis of protest was or should have been known, as provided by our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2) (1985).

The protester was first notified of the award during a November 19 telephone conversation with the Navy contract specialist. While the parties disagree as to the precise content of the conversation, they agree that Tandem was given some information regarding the manufacturer and model number of the major hardware and software proposed by Federal Computer. The parties also agree that Tandem orally requested a debriefing and was told that such a request would have to be made in writing. On November 21, Tandem sent the Navy a telegram requesting a debriefing.

Tandem also on that date telephoned the Navy's project manager. According to Tandem, the purpose of this call was to ensure that Tandem received official notice of the award and a debriefing in a timely fashion. Tandem admits that

during the conversation it acknowledged that it was aware of the award to Federal Computer and had been given a partial hardware and software list. The Navy maintains that Tandem's remarks went further, and raised specific objections regarding Federal Computer's compliance with the salient characteristics.

The protester disagrees with the Navy's position, arguing that it had insufficient information on which to formulate its protest until the debriefing, which was held on November 25, and that it then filed a timely protest with our Office on December 9, the ninth working day after the debriefing. Tandem says it could not formulate its protest without obtaining more detailed technical information than was provided earlier, because it had no information concerning Federal Computer's plans to achieve required integration of the products with the Navy's existing system.

We think that the protest is timely. Even assuming, as the Navy argues, that Tandem could have formulated some grounds for its protest based on the information available before the debriefing, the record shows that Tandem had not yet received comprehensive information about the awardee's proposal. Tandem acted in a timely manner to arrange a debriefing. Under these circumstances, we do not believe Tandem was required, in effect, to file its protest piecemeal, as information on Federal Computer's proposal was obtained; it was reasonable for Tandem to delay filing its protest until after the debriefing. See American Management Systems, Inc., B-215283, Aug. 20, 1984, 84-2 CPD ¶ 199. Since the protest was filed within 10 days after the debriefing, the protest is timely. 4 C.F.R. § 21.2(a)(2).

#### Salient Characteristics

The Navy, in part, concedes Tandem's contention that Federal Computer's proposal did not comply with several of the salient characteristics identified in the RFP. The agency acknowledges that Federal Computer did not comply with characteristics requiring 16 programmable function keys and an adjustable key "click" feature. The Navy also admits that data communications using the proposed equipment will not fully conform to the RFP.

The RFP describes the salient characteristics of the workstation keyboard in relevant part as follows:

"The keyboard shall be detachable and low profile, have a two-position tilt angle

(5-15 degrees), have sculptured keys, contain 16 programmable function keys, cursor control and edit keys, adjustable click sound and 10 IBM PC compatible function keys." (Emphasis added.)

The Tandem brand name workstation includes a total of 26 separate keys; one set of 10 IBM PC compatible keys, plus a set of 16 additional keys that are not found on the standard PC keyboard. When the Tandem workstation is being used as a personal computer, the 10 IBM PC compatible keys are activated; the other 16 function key set is activated when the workstation is used as a terminal connected to a mainframe computer.

The protester's argument concerning the keyboard focuses on the requirement for this "16+10" key configuration, and particularly on the requirement that 16 separate function keys be available when the workstation is used as a computer terminal. It says that the equipment accepted not only deviates physically from the salient characteristic, and is therefore unacceptable, but that the IBM PC is not functionally equivalent because, due to the fewer number of keys, operators must strike multiple keys to perform functions that are performed with a single key on the brand name equipment.

In response, the Navy says the IBM PC is acceptable to it because the PC can perform the same functions as the Tandem workstation. It points out that in terminal mode the 16 separate function keys on the Tandem model perform a total of 32 functions when depressed along with an auxiliary key. The 10 function keys included on the IBM PC keyboard, when used in combination with auxiliary keys ("shift", "alt", and "control"), can perform a total of 40 functions. The Navy says, citing Magnaflux Corp., B-211914, Dec. 20, 1983, 84-1 CPD ¶ 4, that it was proper for it to waive Federal Computer's noncompliance with the 16+10 key requirement and award the contract to that firm, since the protester does not make a less expensive IBM-like machine, and thus was not prejudiced by waiver of the requirement.

We find that the IBM PC offered by Federal Computer does not contain the 16 separate programmable function keys identified as a salient characteristic of the Tandem product and that its proposal, therefore, did not conform to the RFP. In brand name or equal procurements, when salient characteristics are listed in terms of specific performance

standards or design features, the "equal" product must meet these requirements precisely. Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207. Further, a brand name or equal solicitation describing various aspects of a particular firm's approach as salient characteristics is not to be interpreted as expressing only a functional requirement. Castle/Division of Sybron Corp., B-219056, Aug. 7, 1985, 85-2 CPD ¶ 142; MII Lundia, Inc., B-214715, Jan. 3, 1985, 85-1 CPD ¶ 14. On the contrary, technical requirements, stated in clear and precise terms, are presumed to be material to the needs of the government. MII Lundia, Inc., B-214715, supra. Notwithstanding that negotiated procurement techniques are used, offerors have the right to assume that such requirements will be enforced and, on the basis of them, to anticipate the scope of competition for award. Squibb-Vitatek, Inc., B-205306, July 27, 1982, 82-2 CPD ¶ 81.

We also find that Federal Computer failed to offer the adjustable key click required by the RFP. A key click feature makes a sound when the operator strikes a key. The adjustable click feature permits the operator to control the volume of the sound. The Navy does not argue that the RFP requirement was met, but rather, as in its defense of the function key issue, states that it has determined that it does not require the adjustable click feature. According to the Navy, the requirement was included because the description of the salient characteristics in the RFP was taken directly from the descriptive literature for the brand name model, which has the adjustable feature, without first considering whether the feature was required to meet the Navy's needs.

Finally, the RFP required concentrators to permit multiple terminals to communicate over a single line with a mainframe that, the record shows, presently supports a Tandem 6530 protocol.<sup>1/</sup> Specifically, the RFP identified the brand name product as a Tandem 6820 Terminal Cluster Concentrator and stated that the hardware proposed "shall communicate using the 6530 Tandem line protocols."

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<sup>1/</sup> A protocol is a set of rules governing the operation of a communication system. In order to communicate with each other, the units in the system must follow the same protocol.

While Federal Computer originally proposed the Tandem 6820 concentrator, it substituted a Tandem 6600 cluster controller in its best and final offer. It is not clear why it made the substitution, which, as the Navy points out, involves a more expensive unit. It is clear, however, that the 6600 model communicates with mainframe equipment using an IBM protocol and does not support a Tandem 6530 compatible data stream (much less the 6530 protocol) unless additional software is installed on the mainframe. Federal Computer's best and final offer did not propose such software, although the Navy reports that the awardee subsequently indicated it would be furnished without additional cost.

According to Tandem, only its model 6820 concentrator or one of several fully equivalent competing products, meets the Navy's requirements as stated in the RFP; Tandem insists the equipment offered by Federal Computer does not support the required protocol and is unacceptable. In response, the Navy says that with the software Federal Computer says it intended to include, the controller will support 6530 communications to the PCs, although the Navy admits that communications with the mainframe will not conform to the protocol.

Even assuming that Federal Computer would be legally bound to furnish software it does not mention in its proposal (and only confirmed orally), this would only allow the 6600 controller to support the Tandem protocol between the controller and the workstations. Input to the 6600 controller from the mainframe must still conform to the IBM standards. Consistent with the cases cited earlier, we look to the brand name product in interpreting the scope of a listed salient characteristic. The Tandem 6820 supports the 6530 protocol in communicating both with the mainframe and with the terminals connected to it. Tandem's interpretation of the salient characteristic as requiring its 6820 concentrator, or other equipment that is equally capable of using the 6530 protocol, thus appears to be correct. As a result, Federal Computer failed to comply with the salient characteristic since communications between the 6600 model and the mainframe will not conform to the 6530 protocol as required.

In support of its decision to make award to Federal Computer despite its noncompliance with the salient characteristics discussed above, the Navy maintains that waiver of the noncompliance was proper because the awardee's equipment will meet the Navy's needs and Tandem was not prejudiced. We believe, however, that the waiver involved a significant

deviation from the salient characteristics and resulted in prejudice to Tandem and other potential offerors. Federal Computer's offer to furnish 10 physical function keys is not substantially equivalent to an offer to furnish 10+16 key configuration; the differences in the configurations offered have a direct bearing on how the operator uses the equipment, because more keystrokes must be entered. Moreover, differences between protocols have a direct impact on the interchangeability and compatibility of equipment; the record shows, for example, that the 6820 (but not the 6600) concentrators can be cascaded--connected to each other to increase the number of units supported. In view of Federal computer's failure to comply with these requirements, we need not decide whether, as the Navy contends, the key click discrepancy, standing alone, could have been waived.

Concerning prejudice, we think it is significant, as Tandem points out, that while it is only one of several manufacturers who produce equipment equivalent to the brand name product, there are many manufacturers who offer less expensive units that are functionally similar to the IBM PC offered by Federal Computer. Tandem asserts that if potential offerors had understood that the Navy did not need specialized equipment such as it manufactures, the government would have received many more offers than it did from manufacturers of these PC-type units. For its part, Tandem says that, had it known of the Navy's actual needs, it might well have elected not to compete. Tandem thus was prejudiced by the Navy's action inasmuch as the Navy induced Tandem to incur the cost of competing in a procurement in which it might not have participated had it known the Navy did not need the kind of terminals it manufactures.

In these circumstances, it is clear that the Navy acted improperly in relaxing its requirements without amending the RFP. Of course, the Navy should not acquire equipment that exceeds its needs; the proper course of action was to solicit offers under an RFP with salient characteristics that reflected only the government's actual requirements. See Andrew Corp., et al., B-217024, et al., Mar. 25, 1985, 85-1 CPD ¶ 344; Scanray Corp., B-215272, Sept. 17, 1984, 84-2 CPD ¶ 299. Consequently, we are recommending that the contract awarded to Federal Computer be terminated for convenience and that the Navy resolicit using revised specifications that will permit competition from vendors who may be capable of meeting the government's needs but who could not have met the unduly restrictive requirements set out in the original solicitation.

We also find Tandem entitled to its proposal preparation costs and the costs of filing and pursuing its protest, including attorney's fees.

First, we allow recovery of bid or proposal preparation costs if the protester was improperly excluded from the competition and none of the remedies listed in section 21.6(a)(2)-(5) of our regulations, 4 C.F.R. § 21.6(a), is appropriate. EHE National Health Services, Inc., B-219361.2, Oct. 1, 1985, 85-2 CPD ¶ 362. Although we are recommending recompetition, a remedy specifically provided for in section 21.6(a)(3), in this case that remedy may not benefit the protester since Tandem generally does not compete in the market for PC-type units. Since by using the specifications it did the agency improperly induced Tandem to incur the expense of competing, we conclude that Tandem should recover its proposal preparation costs.

If Tandem does decide to participate in the recompetition, however, as it indicated it might attempt to do, Tandem may not also recover its proposal preparation costs.

Second, regardless of whether Tandem participates in the recompetition, our sustaining its protest here will further the purpose of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1174, by broadening competition. Under these circumstances, Tandem is entitled to its protest costs. Washington National Arena Ltd. Partnership, B-219136, Oct. 22, 1985, 65 Comp. Gen. \_\_\_, 85-2 CPD ¶ 435. Tandem should submit its claims for such costs directly to the agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

*Milton J. Jordan*  
for Comptroller General  
of the United States